No. 80-1016

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the railroad company complied with the filing requirements of the General Right-of-Way Act of 1875 with respect to the right-of-way at issue.

2. Whether the 1875 Act allowed a railway company to obtain a 200-foot wide right-of-way for a rail line constructed over the public lands prior to the enactment of the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 720. The opinion of the district court (Pet. App. B) is reported at 454 F. Supp. 531.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. An order denying a petition for rehearing was entered on September 22, 1980 (Pet. App. D), and an order denying a suggestion of rehearing en banc was entered on September 23, 1980 (Pet. App. E). The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 1 and 4 of the General Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 43 U.S.C. 934 and 937, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Section 706(a), 90 Stat. 2793, provided:

> Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres

for each station, to the extent of one station for each ten miles of its road.

* * * * *

Section 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

STATEMENT

1. In 1873, the Utah Southern Railroad Company constructed a rail line over the public lands of the United States, including lands in Section 16, T. 6S, R. 2E, Utah County, Utah. Subsequently, the San Pedro, Los Angeles & Salt Lake Railroad Company acquired Utah Southern's interests and leased the rail line, which remains in its original location, to the Union Pacific Railroad Company. The railroad companies maintain fences on each side of their line approximately 33 feet from the center line of the trackage (Pet. App. A-2, B-2).

In 1875, less than two years after the rail line at issue was constructed, Congress enacted the General Right-of-Way Act, ch. 152, 18 Stat. 482, 43 U.S.C. 934 *et seq.*, which has since been repealed by Section 706(a) of the Federal Land

Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793. Section 1 of the 1875 Act, 43 U.S.C. 934, granted rights-of-way through the public lands of the United States to duly organized railway companies that filed copies of their articles of incorporation and due proofs of organization with the Secretary of the Interior. Section 1 further provided that railway companies invoking the Act would be entitled to a right-of-way "to the extent of one hundred feet on each side of the central line of said road * * *." In Section 4, 43 U.S.C. 937, the 1875 Act provided that a railway company seeking to obtain a right-of-way under the Act shall, in the case of surveyed lands, "within twelve months after the location of any section of twenty miles of its road * * * file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way * * *." Finally, Section 4 also provided for forfeiture of the right-of-way if the rail line was not constructed within five years after location.

Pursuant to the 1875 Act, Utah Southern filed its articles of incorporation and due proofs of organization. At the same time, the railroad company filed a profile map. The filings were duly approved by the Secretary of the Interior in September 1875 (Pet. App. B-4 to B-5).

In 1894, Congress enacted the Utah Enabling Act, ch. 138, 28 Stat. 107. Subject to certain exceptions and limitations, Section 6 of that Act, 28 Stat. 109, granted the State, as school lands, all sections numbered 2, 16, 32 and 36. The State, in turn, patented lands within Section 16, T. 6S, R. 2E, to the predecessors in interest of petitioner Boise Cascade Corporation in 1905. Petitioner subsequently purchased the tract at issue, which is located west of, and adjacent to, the railroad companies' track (Complaint at 2).

2. In 1976, petitioner Boise Cascade Corporation, alleging jurisdiction under the Quiet Title Act, 28 U.S.C. 2409a, initiated this action against the railroad companies and the United States.[1] The dispute centered over title to a 67-foot wide strip of land parallel and adjacent to the fenced portion of the right-of-way. Petitioner claimed that the railway right-of-way extended only to the fence located 33 feet from the center of the trackage, not to a line 100 feet from the center. It contended that the railroad companies were not entitled to a right-of-way 100 feet on both sides of their trackage, as conferred by the 1875 Act, because, *inter alia,* the 1875 Act did not apply to lines constructed before its passage and because the profile map filed with the Secretary depicted the rail line as being located approximately 400 feet east of the line actually constructed in 1873.[2] The railroad companies, in response, contended that they were, by virtue of their compliance with the 1875 Act, entitled to a right-of-way extending 100 feet on both sides of the center of their trackage (Pet. App. A-2 to A-3). The United States moved to dismiss, relying on 28 U.S.C. 2409a(f), which provides that Quiet Title Act suits must be brought within 12 years of the date the plaintiff or his predecessor knew or should have known of the claim of the United States.

3. The district court entered summary judgment in favor of the defendants (Pet. App. B), holding that the railroad companies had secured a 200-foot wide right-of-way under the 1875 Act. The court held that Utah Southern had fully complied with the requirements of the 1875 Act by constructing the line and by subsequently filing its articles

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[1]The United States has potential subsurface and reversionary interests in the right-of-way (Pet. App. A-2).

[2]The railroad companies disputed Boise Cascade's allegation that the profile map did not accurately depict the location of the line constructed in 1873. The courts below found it unnecessary to resolve this factual dispute (Pet. App. A-3).

of incorporation and due proofs of incorporation with the Department of the Interior (Pet. App. B-4 to B-5).

The court of appeals affirmed (Pet. App. A). The court held that a railroad that constructed a line prior to enactment of the 1875 Act could avail itself of the provisions of the Act and that any errors in the filed profile map were immaterial because the actual location of the line on the ground controlled over the profile map (*id.* at A-4 to A-5). In view of this disposition, the court of appeals, like the district court, found it unnecessary to reach the government's contention that the claim against the United States was barred by the 12-year limitations clause of the Quiet Title Act (*id.* at A-8).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or the other courts of appeals, and presents no issues warranting review by this Court. Accordingly, the petition should be denied.

1. In *Jamestown & Northern R.R.* v. *Jones*, 177 U.S. 125 (1900), this Court, in construing the 1875 Act, held that a railroad company becomes a grantee under the Act by filing its articles of incorporation and due proofs of organization with the Secretary of the Interior. *Id.* at 130. The Court further held that the location of the right-of-way becomes fixed by compliance with the provisions of Section 4 relating to the filing of the profile map or, alternatively, by the actual construction of the road. 177 U.S. at 130-131. In so holding, the Court expressly adopted the construction of the 1875 Act set forth by the Secretary of the Interior in *Dakota Central R.R.* v. *Downey*, 8 Pub. Lands Dec. 115 (1889), in which the Secretary stated that Section 4 of the Act, which provides for the filing of a profile map, merely offers the grantee an alternative mode by which, if it so elects, it may secure a fixed right-of-way "*in anticipation*

of that construction by which location is defined in the section making the grant * * *" (*Jamestown & Northern R.R., supra,* 177 U.S. at 131-132, quoting *Dakota Central R.R., supra,* 8 Pub. Lands Dec. at 119 (emphasis in original); see also *Barlow* v. *Northern Pacific Ry.*, 240 U.S. 484 (1916)).

It necessarily follows that if, as this Court held in *Jamestown,* the right-of-way became fixed on the ground upon construction of the road, then the location of that fixed right-of-way is not altered by the subsequent filing of an erroneous profile map. This is especially true where, as here, the plaintiff fails to allege that it relied on the supposedly inaccurate map. *Washington & Idaho R.R.* v. *Coeur d'Alene Ry. & Navigation Co.*, 52 F. 765, 767-768 (C.C.D. Idaho 1892). As this Court stated in *Jamestown* (177 U.S. at 131), "[a]ctual construction of the road is certainly unmistakable evidence and notice of appropriation." Petitioner's suggestion (Pet. 13) that the filing of the allegedly inaccurate profile map might have been taken as evidence that the same railroad company intended to construct a parallel line 400 feet to the east of its existing line in the sparsely settled Utah Territory is unrealistic.

2. Although petitioner concedes (Pet. 4-5) that the Secretary of the Interior accepted the railway's filings pursuant to the 1875 Act, it urges that the right-of-way benefits of the 1875 Act could not be extended to railway companies that constructed railroad lines over the public lands prior to the enactment of the statute. The contention that the 1875 Act does not apply to lines constructed before its enactment was rejected 70 years ago by the Supreme Court of Utah, the very state in which the instant controversy arises. See *Rio Grande Western Ry.* v. *Stringham,* 38 Utah 113, 119-120, 110 P. 868, 870-871 (1910), aff'd on other grounds, 239 U.S. 44 (1915). And with good reason. This Court has noted that

the actual development of the West often preceded congressional authorization of particular actions and that Congress frequently later legislated to legitimize customs and usages sanctioned in practice, if not yet by federal law. Thus, in *Central Pacific Ry.* v. *Alameda County,* 284 U.S. 463 (1932), in construing an act granting rights-of-way over the public lands for public highways in terms indistinguishable from the provision at issue here,[3] this Court stated (*id.* at 473): "Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against the destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government."

Here, nothing in the terms of the 1875 Act restricts its application to rail lines constructed after its passage and, as just noted, its terms are indistinguishable from the right-of-way statute in *Alameda,* which this Court found applicable to preexisting roads. If the 1875 Act were not read to confirm rights-of-way of railroad lines previously constructed, lines constructed over the public lands prior to its passage and without the benefit of specific legislation might be in trespass, for petitioner has suggested no other basis by

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[3]The right-of-way statute at issue in *Alameda* was Section 8 of the Act of July 26, 1866, ch. CCLXII, 14 Stat. 253, 43 U.S.C. 932, which was also repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793. It provided: "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

which they could legitimatize their occupation of the public lands.[4] Yet, it cannot reasonably be supposed that Congress intended to open the public lands to unlimited future railroad construction while, at the same time, withholding its approval for those few rail lines that had already been constructed over the public lands.[5] Therefore, the court of appeals correctly held that a railroad company that had constructed its line over the public lands prior to 1875 could avail itself of the right-of-way benefits of the 1875 Act.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]It does not matter, in considerations of this possible consequence, that petitioner asserts its title to only a 67-foot wide strip of a 200-foot wide right-of-way and does not seek to displace the rail line itself.

[5]If owners of previously constructed lines could not obtain a right-of-way under the 1875 Act, they would have had no incentive to maintain or improve those lines, because they would have been trespassing on the public domain. Such a result would not be consistent with the Act's purpose of opening the West to development.

[6]As previously stated (pages 4-5, *supra*), the courts below did not reach the United States' contention that petitioner's claim against the United States was barred by the 12-year limitations period of the Quiet Title Act, 28 U.S.C. 2409a(f). In light of the disposition of this case by the courts below, there is no need to address that issue here.

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